

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of	:	
	:	
INTERNATIONAL UNION OF OPERATING	:	Case 1
ENGINEERS, LOCAL 139	:	No. 49245 ME-3323
	:	Decision No. 27878
Involving Certain Employes of the	:	
	:	
CITY OF SHELL LAKE	:	
	:	

Appearances:

Mr. Bradley Pederson, City Administrator, City of Shell Lake, 915 Burgs Park Drive, Shell Lake, Wisconsin
Mr. Harry Badding, Business Representative, International Union of Operating Engineers, Local 139, Shell Lake, Wisconsin

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DIRECTION OF ELECTION

On May 17, 1993, the International Union of Operating Engineers, Local 139, (Union) filed a petition with the Wisconsin Employment Relations Commission seeking an election whereby the regular full-time and regular part-time municipal employes of the City of Shell Lake (City) would vote on the question of representation by the Union. The parties could not stipulate as to which employes were eligible to vote in such election, particularly as to whether the Public Works Director was a supervisor or a municipal employe. Hearing was held in the matter before Hearing Examiner Stuart Levitan, a member of the Commission's staff, on August 18, 1993, in Shell Lake, Wisconsin. A stenographic transcript of the hearing was prepared by August 25, 1993. The parties filed written arguments by October 15, 1993. The City filed a reply brief on October 27; the Union, on November 16, waived its right to do likewise. Now, being fully advised in the premises, the Commission issues the following

FINDINGS OF FACT

1. The International Union of Operating Engineers Local 139, herein the Union, is a labor organization with offices at 2233 Birch Street, Eau Claire, Wisconsin.

2. The City of Shell Lake, herein the City, is a municipal employer with offices at 209 West Fifth Avenue, Shell Lake, Wisconsin.

3. On May 17, 1993, the Union filed a petition with the Wisconsin Employment Relations Commission, seeking a representation election for a proposed bargaining unit described as follows:

All regular full-time and regular part-time employees of the City of Shell (Lake), (sic) excluding clerical, supervisory, managerial and confidential employees.

4. The City's Public Works Department, is under the overall direction of the City's Common Council and the Public Works Administration which is comprised of council members. The Department consists of Director Glenn Hile; Water and Sewer Superintendent Gene Carlson, and general laborers Don Shoquist, Jeff Parker and Curt Glessing. All are regular full-time employees except for Glessing, who is temporary full-time. Hile's annual salary is \$30,664.87, (based on a 2,080 hour year, the salary translates into an hourly rate of \$14.73) with no eligibility for overtime, but with an allowance for hour-for-hour compensatory time. Carlson's hourly wage is \$10.18; Parker and Shoquist's is \$9.51, and Glessing's is \$8.00. Unlike Hile, they are all eligible for overtime.

Pursuant to Shell Lake Ordinance 2-3-8, the term and duties of the Director of Public Works are as follows:

SEC. 2-3-8 DIRECTOR OF PUBLIC WORKS.

(a) Appointment. The Director of Public Works shall be appointed by the Common Council. The Director of Public Works shall have an indefinite term of office.

(b) Duties. The Director of Public Works shall have the following duties:

- (1) Plan, direct, inspect and participate in the repair and maintenance of streets, curbs and gutters, sidewalks, street lights, street trees;
- (2) Plan, direct, inspect and participate in the maintenance of parks including grass cutting, playground equipment installation or repair and building maintenance;
- (3) Supervise and participate in plowing of snow and all phases of snow and ice control on City streets, alleys, sidewalks and City-owned public parking lots;
- (4) Supervise and participate in the operation of the municipal garage and the repair and maintenance of City-owned vehicles and equipment;
- (5) Schedule the daily and weekly jobs of the Public Works Department employees and make necessary modifications due to emergencies;
- (6) Plan for the maintenance and repair of all City vehicles, machinery and equipment and is responsible for related records;
- (7) Work with consulting engineer in planning street and storm sewer projects;
- (8) Serve as coordinator between consulting engineer and contractors in street and storm sewer projects;

- (9) Repair and maintain all official City sign use and traffic control marking, to be done in compliance with the State Traffic Code and local ordinances;
- (10) Serve as the primary licensed operator for the sewer and water utilities;
- (11) Serve as City Forester;
- (12) Perform such other duties as may directed by the Common Council.

There have been two hires during Hile's tenure as Director. At the time Parker was hired in 1985, applications were screened by a committee consisting of the Mayor, two alderpersons and Hile. This committee then interviewed five candidates, and reached a consensus to recommend to the Common Council that Parker be hired. In May, 1992, Parker was injured, necessitating an emergency hire. Parker suggested the ability and availability of Glessing to Hile, who brought the name to the Public Works Administration; after an interview, the Public Works Administration hired Glessing. Other than relaying Parker's recommendation of Glessing to the PWA, Hile did not take a major role in the selection of Glessing. In approximately March, 1993, after Parker presented a physician's note authorizing his return to work, Hile reinstated him. At the next meeting of the Common Council, the Council, aware of Hile's actions, returned Parker to Worker's Compensation status until approximately May. During this time, Glessing continued on duty for the additional 90 days, a decision by the Common Council in which Hile did not participate.

Hile began working for the City as City Engineer in 1980, at which time he was paid an hourly wage. Primarily due to his greater contact with city administrators, Hile negotiated on behalf of himself and the other departmental staff as to their wages, hours and conditions of employment. Ostensibly, the City moved to end that practice on January 9, 1984, when the Common Council held that "supervisors will negotiate separately from the other employees next year." On November 1, 1984, the Ad Hoc Committee on Wages recommended as follows:

1. That the City Engineer be paid a salary of \$20,466, duties to include supervision of the City Crew, administrative duties, attendance at City Planning Commission, Public Works and City Council meetings. The City Engineer is expected to work approximately a 40-hour week, with the understanding that occasional, emergency work may be required in his professional status. The City Engineer is eligible for compensatory time but not for overtime pay.

For reasons not in the record, the new policy took some years to implement, so that Hile continued to negotiate both for and with other departmental staff. For example, on October 29, 1986, Hile requested of the City's Negotiating Committee a six per-cent salary increase for himself; an additional ten sick days for all departmental staff, including himself; the designation of Jeff Parker as supervisor in Hile's absence, and a salary increase to Parker of four per-cent higher than that for other employes. Hile was named Public Works Director, and ceased serving as City Engineer, in 1989.

Hile has never disciplined any employe, and has no clearly defined authority to do so. The City does not have a system of issuing formal evaluations. Hile has the authority to approve or deny vacation, sick leave, overtime and compensatory time. He has never denied a vacation request. Hile's own time-off requests are reviewed and approved by the City Administrator, Bradley Pederson. Under standard departmental policy, the crew-member on weekend duty will respond to an urgent situation, thus increasing the use of overtime, without prior approval from Hile.

In the summer of 1993, the City filed a request for reimbursement from the Department of Industry, Labor and Human Relations, for work undertaken at the Shell Lake Municipal Airport. The State disallowed \$377.73, representing costs attributable to Hile, explaining that, "supervisory staff wages are not an allowable cost for reimbursement under the PECFA program." Hile's actual involvement in the project consisted primarily of serving as a laborer with the rest of the crew.

The City occasionally employs seasonal summer help through an organization known as Concentrated Employment Services, which helps defray a substantial portion of the workers' pay. Hile has the authority to recommend how many extra employes are needed. His recommendations are generally followed.

Hile is the City's primary contact with engineers and other outside personnel with whom the City becomes involved in the design and construction of public works projects.

In preparing budget submissions, Hile and Pederson review the prior year's figures and determine if adjustments are necessary.

In assigning and directing the work, Hile follows a largely consensual model, receiving input from Pederson and other sources, including non-City sources, and discussing the appropriate course of action with Pederson and DPW staff. Hile spends approximately 85% of his time working with and performing the same duties as other Public Works employes.

5. Hile does not possess and exercise supervisory authority in sufficient combination and degree to be deemed a supervisor.

Upon the basis of the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. All regular full-time and regular part-time employes of the City of Shell Lake, excluding clerical, supervisory, managerial and confidential employes constitutes an appropriate collective bargaining unit within the meaning of Sec. 111.70(4)(d)2.a., Stats.

2. The incumbent of the position of Director, Department of Public Works, is not a supervisory employe within the meaning of Sec. 111.70(1)(o)1., Stats, and is a municipal employe within the meaning of 111.70(1)(i), Wis. Stats.

3. A question of representation within the meaning of Sec. 111.70(4)(d), Stats., has arisen among the municipal employes in the collective bargaining unit set forth in Conclusion of Law 1.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

DIRECTION OF ELECTION 1/

An election by secret ballot shall be conducted under the direction of the Wisconsin Employment Relations Commission within forty-five (45) days from the date of this Directive in the collective bargaining unit consisting of all regular full-time and regular part-time employes of the City of Shell Lake Department of Public Works, excluding supervisory, managerial and confidential employes, who were employed on November 23, 1993, except such employes as may prior to the election quit their employment or be discharged for cause, for the

purpose of determining whether the required number of employes desire to be represented by the International Union of Operating Engineers, Local 139 for the purposes of collective bargaining with the Municipal Employer named above, or whether such employes desire not to be so represented by said labor organization.

Given under our hands and seal at the City of Madison, Wisconsin this 23rd day of November, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

(Footnote 1/ appears on the next page.)

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An

agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(Footnote 1/ continues on the next page.)

(Footnote 1/ continues from the previous page.)

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

CITY OF SHELL LAKE

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DIRECTION OF ELECTION

POSITIONS OF THE PARTIES

In support of its contention that the subject position is a municipal employe, the Union asserts that the incumbent was changed from hourly to salaried for purely economic reasons; that the incumbent has no authority to

hire, fire or discipline, nor to do any purchasing, and that the position, at most, is that of a lead worker. The Union also notes similarities between this case and others, where similarly situated employees were found to be municipal.

In support of its contention that the subject position is supervisory, the City contends that the incumbent has the authority to recommend hiring, promotion, discipline and discharge; the authority to direct and assign the work force; is salaried, making him unique among the city crew; exercises independent judgment and discretion in supervising employees; assists in the planning and administration of public works projects, and assists in the preparation of the annual budget. The City also notes that, in a claim for reimbursement under the Petroleum Equipment Claim Fund Act, the Department of Industry, Labor and Human Relations found the incumbent's salary to be a non-eligible cost, as a supervisory/administrative expense.

In its reply brief, the City rejects the Union's assertion that Hile's transfer from an hourly to a salaried employe was for economic reasons. The City also states that Hile's testimony that he had not been given authority to hire or discipline is immaterial, in that such actions are taken only by the City Council, based on supervisory recommendation and committee action. The City further rejects as inconsistent with the record the Union's description of Hile as a lead worker, in that he clearly supervises and directs the activities of the department. The fact that Hile exercises his authority in a polite rather than a dictatorial manner, the City asserts, should not mask the existence of the authority.

DISCUSSION

The statutory and case law format for evaluating a claim of supervisory status is clear and well-settled. The factors on which we focus are as follows:

1. The authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employes;
2. The authority to direct and assign the work force;
3. The number of employes supervised, and the number of persons exercising greater, similar or lesser authority over the same employes;
4. The level of pay, including an evaluation of whether the supervisor is paid for his/her skills or for his/her supervision of employes;
5. Whether the supervisor is supervising an activity or is primarily supervising employes;
6. Whether the supervisor is a working supervisor or whether he spends a substantial majority of his time supervising employes; and
7. The amount of independent judgement exercised in the supervision of employes. 2/

Applying the facts of this case to those factors, we find that Hile, the Director of Public Works, does not possess supervisory authority in sufficient

2/ City of Milwaukee, Dec. No. 6960-J (WERC, 5/89).

combination and degree to be deemed a supervisory employe.

There have been two hires during Hile's tenure. In one, he participated as a member of a four-person committee which operated on a consensus model. In the other, he merely passed along to the Public Works Administration the name of an interested applicant, whose interest and qualifications were vouched for by another DPW employe.

We do not believe that participation in a consensus decision-making process can automatically be used to challenge the alleged supervisory status of one or more of the participants. The consensus decision-making process is a personnel-management technique which does not necessarily dissolve the supervisory status of the participant. In the instant case, however, the record does not contain sufficient information as to Hile's actual role in the consensus process for us to make an informed decision as to whether he made an effective hiring recommendation. In the second situation, it seems clear enough that Hile was acting primarily as a messenger to the Public Works Administration in an emergency situation. This does not reflect any effective authority to recommend hire.

There was also an episode in which the Common Council overturned Hile's decision to reinstate Parker and returned him to Worker's Compensation status. Further, Hile was not consulted when Parker's replacement was then reinstated for an additional 90 days. The Council's actions in this matter are contrary to the City's argument that Hile is a supervisor.

Hile has the authority to direct and assign the work force, but it is an authority which he does not have to employ with any frequency. Sometimes work assignments come from non-departmental sources, such as the City Administrator or outside parties; sometimes work assignments arise from the other departmental employes themselves. In all, the record indicates that Hile operates on a largely collegial, almost consensual, basis.

As Hile is a salaried employe ineligible for overtime, his salary cannot be compared precisely with other members of the crew, other than to state that he is paid at a somewhat higher rate. Our evaluation, though, is that this higher pay seems more a reflection of his skills, administrative responsibilities and length of service than for his supervision of the other employes.

Hile's participation in the review and implementation of various city projects is an important aspect of his job, but it is an aspect which does not go directly to the issue of supervisory status.

Accordingly, we have found Hile to be a municipal employe, and have entered the appropriate order directing an election.

Dated at Madison, Wisconsin this 23rd day of November, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner